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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 283

UNION TANK CAR COMPANY, a New Jersey corporation,

Petitioner,

vs.

DRAGOR SHIPPING CORPORATION, a Delaware corporation, formerly WARD INDUSTRIES CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION TANK CAR COMPANY, a New Jersey corporation, petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cause on April 7, 1966.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is not yet reported, but is printed as Appendix A hereto, *infra*, pp. 15-23. The United States District Court for the District of Arizona, sitting at Tucson, Arizona, rendered no opinion, but its decision necessarily included a finding that service of process had been duly made on Dragor's agent in Arizona (R. 12-14).

JURISDICTION

The judgment of the Court of Appeals was entered on April 7, 1966. It is printed as Appendix B hereto, *infra*, p. 24. On May 4, 1966, petitioner filed a timely petition for rehearing which was denied on May 24, 1966. The jurisdiction of this Court is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Where, after a foreign corporation has appointed a resident agent in Arizona to accept service of process, it executes a promissory note, and thereafter surrenders its license to do business in Arizona, is service on such agent pursuant to Rule 4(d)(3) of the Federal Rules of Civil Procedure, in an action in Arizona on such promissory note, violative of the due process clause of the Federal Constitution?

2. Where a foreign corporation has been served with process pursuant to an Arizona statute requiring an irrevocable consent, to service of process by service upon the Arizona Corporation Commission, upon a voluntary withdrawal from the state, and an action is

filed on a promissory note given by the corporation prior to withdrawal, in settlement of claims arising out of transactions in Arizona, is such service in such action violative of the due process clause of the Federal Constitution because, prior to such service, the foreign corporation had been permitted to surrender its license to do business in Arizona "except as to creditors"?

3. Where the State of Arizona has limited the surrender of a foreign corporation's license to transact business by permitting it to file a withdrawal from the state "except as to creditors," and it thereafter defaults under an agreement settling claims arising out of business activities in Arizona, does the due process clause preclude a court in Arizona from considering such prior business activity in determining whether jurisdiction over the foreign corporation in a suit on the settlement agreement can be obtained through substituted service of process made in accordance with the Arizona corporation laws?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved are printed as Appendix C hereto, *infra*. pp. 25-27.

STATEMENT OF THE CASE

This action was filed against Dragor Shipping Corporation (Dragor) on December 23, 1964. The jurisdiction of the Arizona District Court was invoked on the basis of diversity of citizenship. Union Tank Car Company (Union) is a New Jersey corporation having its principal place of business in Illinois. Dragor is a

Delaware corporation having its principal place of business in New York (R.2).

The complaint alleged that Dragor had defaulted in payment of the sum of $1,000,000 and interest under a promissory note and an agreement settling claims between the parties which arose out of construction contract work performed in the State of Arizona (R.2-4). Service of process was made upon Dragor by delivering copies of the summons and complaint to both Dragor's registered agent, C.T. Corporation, and the Arizona Corporation Commission (R.12-14).[1]

On January 12, 1965 Dragor appeared specially and filed a motion to quash service of process and dismiss the action on the ground that the District Court had not obtained jurisdiction over its person through the service of the process employed (R.15-16). The motion was submitted on pleadings, affidavits, and exhibits which established the following facts accepted by both parties and the courts below as true (R.2-11, 17-27, 61-63).

On July 29, 1947 Dragor had obtained a certificate of authority from the Arizona Corporation Commission to transact business within Arizona. It continually maintained that authority until April 30, 1964 (R.25). Dragor designated C. T. Corporation as its statutory agent upon whom process might be served in Arizona (R.14). Under A.R.S. § 10-481 the Arizona

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[1] Service was made on both the designated agent and the Arizona Corporation Commission, pursuant to *Arizona Barite Co.* v. *Western-Knapp Engineering Co.* (C.A.9,1948), 170 F.2d 684. In that case, after the defendant corporation had withdrawn from Arizona and sought to revoke the appointment of its agent, service had been made, both on the designated agent and the Arizona Corporation Commission, and such service was held valid.

Corporation Commission was irrevocably designated as agent for Dragor, in the event of revocation or withdrawal of its certificate, for the purpose of receiving process in actions involving business done or transactions arising in Arizona (Appendix C, *infra,* p. 26).

While so licensed to transact business in Arizona, Dragor formed a joint venture with Idaho-Maryland Industries, Inc. (IMI), a California construction company. On October 23, 1961 that joint venture entered into a second tier subcontract with Union for the construction of Titan II missile base facilities in California and Arizona. The Arizona construction involved work on the facilities at Davis-Monthan Air Force Base, Tucson, Arizona. During the performance of this work, IMI filed a petition under Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of California (R.5).

In May, 1962 Union asserted that the joint venture was in default in the performance of the Arizona work and filed a diversity action against Dragor in the United States District Court for the Northern District of Illinois, Eastern Division, in order to recover its losses. Dragor appeared and moved to transfer the action to the United States District Court for the District of Arizona on the ground that all matters involved in the action originated in Arizona. After the case was so transferred, Dragor instituted a separate action against Union in the same Arizona District Court, seeking rescission of the construction contract and damages (R.5-8).

On October 3, 1963, shortly before the date set for trial *and while Dragor was still licensed to transact business in Arizona,* the parties entered into a settle-

ment agreement pursuant to which Dragor agreed to pay Union $1,000,000 with interest on or before September 30, 1964 (R.5). The agreement further provided for the exchange of releases by the parties of their respective claims in the above-described litigation and for the dismissal with prejudice of their respective actions then pending in the Arizona District Court. The documents contain no provisions specifying them to be New York contracts; it is not claimed the parties intended them to be New York contracts; and the note evidencing the $1,000,000 indebtedness specifically provides that it is to be construed according to the law of Illinois, where Union's principal office is located. The documents were signed in New York October 3, 1963 by Dragor's officers. On the same day, in Arizona, the contract was partially performed when local counsel for the parties prepared, executed and filed in the District Court in Tucson, Arizona, stipulations for dismissal of the cases pending in Arizona (R.6); whereupon the court entered an order of dismissal.

On April 30, 1964, seven months after executing the $1,000,000 note and settlement agreement, Dragor obtained permission from the Arizona Corporation Commission to withdraw from the state. A certificate was issued by the Commission stating (R.25):

> "I, S. C. CORBITT, Secretary of the Arizona Corporation Commission, do hereby certify that the records of the Arizona Corporation Commission show WARD INDUSTRIES CORPORATION, a DELAWARE corporation qualified on the 29th day of July, 1947, and existing under and by virtue of the laws of the State of Arizona, deposited in the office of the Arizona Corporation Commission a WITHDRAWAL, and did on April

30, 1964, complete all requirements necessary to permit the filing of said Withdrawal and thereupon said corporation ceased to exist, except as to creditors."

Based on the foregoing facts, the District Court on February 2, 1965, denied the motion to quash and dismiss Union's case and directed Dragor to answer the complaint (R.182). In its answer, Dragor did not dispute non-payment of the $1,000,000 indebtedness, but did assert a counterclaim for damages in an amount of "not less than the sum of $1,000,000" on the ground that Union had breached the settlement agreement by improperly prosecuting certain claims against the United States Government "arising from and out of the Titan II Davis-Monthan Air Force Base Contract" in Arizona, in which claims Dragor asserted that it retained a contingent financial interest (R.98).

On June 1, 1965, the District Court entered judgment against Dragor for $1,037,500 pursuant to F.R.C.P. Rule 54(b) (R.151, 184). The District Court then set Dragor's counterclaim for trial on December 7, 1965.[1]

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[1] When the case was called on the trial date, Dragor's counsel did not appear to prosecute the counterclaim and it was dismissed for want of prosecution. An appeal from that dismissal is presently pending before the Court of Appeals for the Ninth Circuit (Docket No. 20904).

On appeal, the court below reversed the judgment of the District Court on the ground that the service of process employed in the action was insufficient to secure jurisdiction over Dragor's person because that corporation had not had "minimum contacts" with Arizona sufficient to satisfy the due process requirements of the Federal Constitution. The Court was of the opinion that where

> "the agreement sued upon is in the nature of a settlement of existing claims, and the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection." (Appendix A, p. 22)

The court concluded that Union must bring its action against Dragor in New York, where the documents were signed, or in Delaware, where Dragor was incorporated, rather than Arizona, where the contract which gives rise to the controversy was to be performed. (Appendix A, p. 23)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Conflict With Decisions Of This Court In That It Holds That A Service Of Process Made Under Rule 4(d)(3) Of The Federal Rules Of Civil Procedure Is Unconstitutional. The Court Below Said: "It is sufficient to say that the service of process thereby authorized must pertain to an action arising out of or involving business done or transactions arising in Arizona."

In *Ex parte Schollenberger,* 96 U.S. 369 (1878), this Court held that the designation of an agent by a foreign corporation pursuant to state law constituted an actual consent by that corporation to be found within the state and to be subject to the jurisdiction of local courts through service of process on the statutory agent. Suits in the Federal courts situated in the state were also held within the scope of that consent. *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.,* 309 U.S. 4, 7 (1939).

Moreover, the fact that the foreign corporation at a later date might voluntarily surrender its certificate of authority and discontinue transacting business in a particular state is held not to terminate the authority of the designated agent to accept service of process. This was decided in *Mutual Res. Fund Checking Asso.* v. *Phelps,* 190 U.S. 147 (1902), and was reaffirmed in *Washington ex rel Bond & G. & T.* v. *Superior Court,* 289 U.S. 361 (1932) where this Court declared, "the provision that the liability thus to be served should continue after withdrawal from the state afforded a lawful and constitutional protection of persons who had there transacted business with the appellant." (289 U.S., at p. 364.) See also *American R. Exp. Co.* v. *Royster Guano Co.,* 273 U.S. 274 (1927). Compare

Arizona Barite v. *Western Knapp Eng., Co.,* (C.A.9, 1948, 170 F.2d 684), holding the method of service used in the instant case to be valid, under Arizona law, on a withdrawn foreign corporation.

The *Schollenberger* doctrine was further expanded in *Nierbo Co.* v. *Bethlehem Shipping Corp.,* 308 U.S. 165 (1939), where the designation of the statutory agent was held to constitute a waiver of venue as well as a method for securing personal jurisdiction over a foreign corporation. In describing the scope and meaning of such designation, attention was called to Justice Cardozo's statement that "the stipulation is . . . a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent." *Bagdon* v. *Philadelphia R. Coal & I. Co.,* 217 N.Y. 432, 436, 111 N.E. 1075 (1916).

Pursuant to Ariz. Rev. Stat. § 10-481, Dragor appointed C. T. Corporation as its statutory agent in Arizona. C. T. Corporation accepted service on behalf of Dragor in this action (R.15), and the latter has never contended that this agent thereby acted contrary to prior instructions or that it had ever received any notification from Dragor that such agency was revoked. Service on this "true" agent, therefore, complied exactly with F.R.C.P. Rule 4(d)(3), which provides that in any civil action instituted in a United States district court, personal jurisdiction over a foreign corporate defendant may be secured by delivering a copy of the summons and complaint in the action to an "agent authorized by appointment or by law" to receive process.

The court below does not find or rule that the principal-agent relationship between Dragor and C. T. Cor-

poration had been severed by any notice to the agent when Dragor received limited permission to withdraw from Arizona, nor does the court find any revocation of the agency by operation of law, nor is any revocation asserted by Dragor.

The petitioner submits that the court below has held that service of process on Dragor's appointed agent in Arizona is unconstitutional under the due process clause of the Federal Constitution in direct conflict with the *Schollenberger* line of cases as well as the minimum contacts doctrine announced in *International Shoe Co.* v. *State of Washington,* 326 U.S. 310 (1945), and applied in *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

2. The Refusal To Permit Service Of Process Pursuant To The Arizona Statute In Effect Holds Such Statute Unconstitutional In Conflict With The Decisions Of This Court.

This Court has recognized the important public interest involved in providing citizens with a local forum in which they may resolve controversies with persons residing outside state borders. In consequence, state statutes liberalizing the use of the substituted service of process or so-called "long-arm" statutes have been approved so long as the controversy in suit arises out of some activity undertaken by the non-resident within the forum state. *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957).

The Court of Appeals declared, "The claims here asserted by Union do not arise out of or involve business done or transactions arising in [Arizona]. They pertain only to the settlement agreement executed and delivered in New York." (Appendix A, *infra,* p. 23.)

The Court also said, "No contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona." (Appendix A, *infra*, p. 21.)

These statements overlook the important facts that the settlement agreement concerned an existing controversy over the performance of substantial construction work in Arizona, and that Dragor has a pending counterclaim for over $1,000,000 damages for alleged breach of such agreement. (R.98) The Court believed that requirements of due process prevented any consideration of Dragor's business activities in Arizona leading up to the settlement because at common law the agreement worked an accord and satisfaction which "superseded and extinguished" all previous existing claims. (Appendix A, *infra*, p. 21.)

The Court on due process grounds now makes the availability of a local forum depend upon whether the citizen has sought to settle his claim. When settlement is eschewed, jurisdiction over a non-resident is assured. When settlement is agreed upon, even though the settlement is subsequently repudiated as both parties claim in the instant case, jurisdiction over a defaulting corporation is no longer available regardless of how substantial its contacts with the forum, at least where the agreement happens to be executed outside the state.

In effect, the Court held here that the settlement contract insulated Dragor from its contacts with Arizona over a period of 17 years. Despite the fact that it was indebted on the settlement contract and note at the time it withdrew, under the lower court's theory,

the settlement contract operates retroactively to a date prior to Dragor's withdrawal from Arizona.

This strained and technical view was apparently promulgated on the mistaken theory that otherwise Rule 4(d)(3), under this state of facts, would be unconstitutional as violative of due process of law.

The instant decision thus, in effect, overrules prior decisions of this Court. It should be rejected on review by this Court.

CONCLUSION

For the reasons stated above, petitioner prays that a writ of certiorari issue to review the judgment of the court below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUT

DRAGOR SHIPPING CORPORATION, a corporation, formerly Ward Industries Corporation,

Appellant,

vs.

UNION TANK CAR COMPANY, a corporation,

Appellee.

No. 20,416

[April 7, 1966]

Appeal from the United States District Court
for the District of Arizona

Before: HAMLEY, MERRILL and BROWNING, Circuit Judges

HAMLEY, Circuit Judge:

Union Tank Car Company (Union) brought this action against Dragor Shipping Corporation, formerly Ward Industries Corporation, in the United States District Court for the District of Arizona.[1] Plaintiff sought a judgment in the sum of $1,000,000, with interest from January 1, 1964. Such relief was claimed on the basis of an allegation that Dragor had failed to fulfill its obligations, under a settlement agreement dated October 3, 1963, to pay that amount, and under a promisory note in that amount given to Union by Dragor under the terms of the agreement.

District court jurisdiction was asserted on the basis of diversity of citizenship. Union is a New Jersey corporation having its principal place of business in Illinois. Dragor is a Delaware corporation having its principal place of business in New York.

[1]For convenience, both Dragor and its predecessor, Ward Industries Corporation, will be herein referred to as Dragor.

Service was made upon Dragor by delivering copies of the summons and complaint to the Director of Incorporation of the Corporation Commission of the State of Arizona, and to the assistant secretary of Dragor's purported statutory agent, C. T. Corporation. Dragor appeared specially and moved for an order quashing, vacating and annulling the service of process as invalid, and dismissing the summons and complaint, on the ground that the court did not obtain jurisdiction over the person of Dragor or the subject matter of the action.

The motion to quash and dismiss was denied. The district court thereafter denied Dragor's motion to amend the order to add recitals thereto which would have permitted an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1964). Dragor then moved in this court for leave to file a petition for a writ of prohibition restraining the district court from proceeding with the action in that court. We denied leave to file the petition.

Dragor then filed its answer in which it denied the essential allegations of the complaint, and raised the defenses of lack of jurisdiction, insufficiency of process and improper venue. As a part of its answer, Dragor asserted a counterclaim in which it was alleged that Union had breached the settlement agreement and a separately executed covenant not to sue. Dragor sought dismissal of the complaint and judgment against Union in the sum of not less than $1,000,000.[2]

Union, proceeding under Rule 12(c), Federal Rules of Civil Procedure, responded with a motion for judgment in its favor on the complaint on the ground that Dragor's answer failed to state a legal defense.[3] At the same time, Union moved for dismissal of the counterclaim pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure (failure to state a claim upon which relief can be

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[2]In its counterclaim Dragor stated that, to avoid a default in answering, it had been compelled to file the counterclaim as a compulsory counterclaim, and that it did so without waiving or intending to waive the objections which it had theretofore raised and asserted, and had alleged in its answer, ". . . to the jurisdiction and venue of this court."

[3]In the consideration of that motion, matters outside the pleadings, consisting of affidavits and exhibits, were presented to and not excluded by the district court. Under Rule 12(c), the motion must therefore be treated as one for summary judgment under Rule 56, Federal Rules of Civil Procedure.

granted). The motion for judgment on the complaint was granted and the motion to dismiss the cross complaint was denied.[4] Pursuant to Rule 54(b), Federal Rules of Civil Procedure, the court made an express determination that there was no just reason for delay and directed the entry of judgment on the complaint in the sum of $1,037,500. A judgment in this sum was entered on June 1, 1965. Dragor then took this appeal from the judgment and also from the earlier order denying its motion to quash, vacate and annul the service of process.

Dragor's sole contention on the appeal is that the Arizona District Court's assumption of jurisdiction over the person of Dragor and thereby over the subject matter of this action deprived Dragor of due process, and is therefore unconstitutional.[5]

The principle Dragor seeks to invoke is that due process requires that in order to subject a defendant to a judgment *in personam*, if he is not present within the territory of the forum, he must have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. See *International Shoe Co. v. Washington*, 326 U.S. 310, 316.[6]

The established facts necessary to be considered in determining whether Dragor had the minimum contacts with Arizona sufficient to satisfy this due process requirement, are set out below.

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[4]Union advises in its brief on appeal that trial on the counterclaim was set for December 7, 1965. At that time Dragor failed to appear and its counterclaim was dismissed for lack of prosecution. Dragor's appeal from that order is now pending in this court in Docket No. M-2709.

[5]Thus Dragor does not renew here the defense, raised in its answer, that, under 28 U.S.C. § 1391(c) the district court of Arizona constituted an improper venue.

[6]The same principle, in effect, was applied in the subsequent Supreme Court cases of *McGee v. International Life Ins. Co.*, 355 U.S. 220, and *Hanson v. Denckla*, 357 U.S. 235. In the later decision of this court in *L. D. Reeder Contractors of Arizona v. Higgins Industries, Inc.*, 9 Cir., 265 F.2d 768, 771, this court after saying that the problem was one of "judicial jurisdiction," approved the following statement:

> ". . . judicial jurisdiction exists whenever a state has sufficient contact with a person to make the exercise of jurisdiction reasonable, *i.e.*, to make it consistent with the requirements of due process for the state to try in its courts a particular case relating to that person."

On July 29, 1947, Dragor obtained a certificate of authority from the Arizona Corporation Commission authorizing that company to transact business within Arizona. This was done in conformity with the requirements of Ariz. R.S. § 10-481. In obtaining that authority Dragor, among other things, complied with the requirement of section 10-481(A)(2) which provides that a foreign corporation must:

> " . . . file with the corporation commission, in the form prescribed by the commission, an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license to do business in this state, and which shall provide that actions arising out of or involving business done or transactions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission."

While licensed to transact business in Arizona, Dragor formed a joint venture with Idaho-Maryland Industries, Inc., (IMI), a California construction company. On October 23, 1961, that joint venture entered into a second-tier subcontract with Union for the construction of facilities in California and Arizona. The Arizona construction consisted of Titan II missile launch facilities at the Davis-Monthan Air Force Base, Tucson, Arizona. During the performance of this work, IMI filed a petition under Chapter 11 of the Bankruptcy Act in the United States District Court for the Southern District of California. Certain proceedings between Dragor and IMI ensued, resulting in a compromise agreement between them under which Dragor took an assignment of all of IMI's rights under the contract between the joint venture and Union.

In May, 1962, asserting that the joint venture was unable to complete the Arizona work, Union filed a diversity action against Dragor in the United States District Court for the Northern District of Illinois, to recover losses alleged to have been sustained by reason of the asserted default. Dragor entered a general appearance in the action and moved to transfer it to the United States District Court for the District of Arizona on the ground that all matters involved in the action originated in Arizona. The case was thereupon transferred to the United States District Court for the District of

Arizona, at Tucson, where it was docketed as *Union Tank Car Company v. Ward Industries Corporation,* Civ. 1482—Tuc. While this case was being transferred to Arizona, Dragor instituted a separate action against Union in the same Arizona court, seeking rescission of the subcontract with Union and money damages. This case was docketed as *Ward Industries Corporation v. Union Tank Car Company,* Civ. 1478—Tuc.[7]

Extensive pretrial proceedings were subsequently conducted. However, on October 3, 1963, just prior to the trial date of these actions, the parties entered into an agreement of settlement. Under the terms of this agreement Union and Dragor mutually released each other from any and all actions and claims, with certain exceptions.[8] It was provided that stipulations of dismissal with prejudice would be delivered by the parties in the two Arizona actions referred to above.

With regard to the *Mosher Steel Company* action referred to in note 8, or any other action which might result from a claim asserted by Mosher Steel Company against Union or Dragor, Union and Dragor separately covenanted not to assert any claim against the other. This covenant not to sue was executed at the same time as the settlement agreement.

Under the settlement [illegible] Dragor agreed to pay Union, on or before September [illegible] um of $1,000,000, with interest at the rate of five [illegible] commencing from January

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[7]As another outgrowth of the controversy which developed between these companies, Union made certain claims over against Ward in *United California Bank v. Union Tank Car Company,* Case No. 62-1023 JWC in the United States District Court for the Southern District of California.

[8]These exceptions were as follows:

"2. This agreement shall not constitute a release by UNION or WARD of any claim which either party may have against the other arising out of an action entitled MOSHER STEEL COMPANY, ET AL, VS. THE FLUOR CORPORATION, LTD., ET AL, in the U.S. District Court, Tucson District, Case No. CIV 1605,

"3. This agreement shall not constitute a release by WARD of the claim of IMI-WARD, a Joint Venture, for contract adjustments dated August 23, 1963 which claim shall be filed by UNION with THE FLUOR CORPORATION, LTD., and the U.S. Government with such changes therein as UNION shall make with intent to improve said claim."

1, 1964, such sum to be evidenced by a non-negotiable promissory note of Dragor drawn to the order of Union. The settlement agreement further provided that Dragor would assign to William B. Browder all claims of the joint venture against Union, The Fluor Corporation, Ltd., or the United States arising out of construction of facilities at the Davis-Monthan Air Force Base, Tucson, under the contract referred to above. It was provided that sums actually received by Union from the Fluor Corporation, Ltd., the United States or otherwise, after September 30, 1963, as a result of that contract, would be used to reduce the sum and obligation set forth in the note, according to a prescribed schedule.[9]

The settlement agreement, promissory note and covenant not to sue were executed and delivered between Union and Dragor in New York. The stipulations dismissing the two Arizona suits, called for by the settlement agreement, were executed in New York and thereafter filed in Arizona. Several months after this had been done, on April 30, 1964, Dragor deposited in the office of the Arizona Corporation Commission a "withdrawal" from Arizona. The Commission's certificate to this effect states that Dragor had completed all requirements necessary to permit the filing of the withdrawal ". . . and thereupon said corporation ceased to exist, except as to creditors."

Dragor did not pay to Union on the appointed day of September 30, 1964, the $1,000,000 called for by the settlement agreement and promissory note. Accordingly, on December 1, 1964, towards the close of the trial in the *Mosher Steel Company* action in the Arizona District Court in which both Union and Dragor were defendants, Union moved for leave to file a cross-claim against Dragor to recover judgment in the sum of $1,000,000 for breach

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[9]The settlement agreement contains this further provision concerning Dragor's stipulated payment to Union:

> "In the event that the aforementioned claims have not been finally determined and paid to UNION prior to September 30, 1964, WARD shall pay the principal sum and interest as hereinbefore set forth less credits for payments made by THE FLUOR CORPORATION, LTD., or the U.S. Government to UNION prior to September 30, 1964, and UNION shall thereafter promptly pay over to WARD any sums due and payable under this paragraph No. 5 which THE FLUOR CORPORATION, LTD., or the U.S. Government shall pay to UNION thereafter."

of the settlement agreement and failure to pay the promissory note. On December 21, 1964, the court in that case denied the motion.

Two days later Union commenced the action now before us, making the same claims that it had sought to assert as a cross-claim in the *Mosher* case. As before stated, copies of the summons and complaint were served upon the Arizona Commission and Dragor's purported statutory agent.[10] Dragor responded with its motion to quash and dismiss in which that company advanced the constitutional argument which it renewed in its answer and reasserts on this appeal.

Union's claims against Dragor, asserted in this suit, are based upon the alleged breach of the settlement contract and nonpayment of the promissory note. If that contract and promissory note have a "substantial connection" with Arizona, the requirements of due process have been satisfied. See *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223.

Union argues, in effect, that this contract and note have substantial connection with Arizona because, although executed and delivered in New York, they were intended to compose differences between the parties arising from their business dealings with each other in Arizona.

All business dealings in Arizona between Union and Dragor had ceased before the settlement agreement was executed. There remained certain legal claims, one against the other, arising from those dealings. Those legal claims were, with the exceptions referred to in note 8, completely superseded and extinguished by the settlement agreement and promissory note.[11] No contention raised in Union's complaint or Dragor's answer brings into question any issue of fact or law pertaining to the former dealings between these parties in Arizona. The claims sued upon neither arise from nor involve the prior dealings, but are concerned only with whether there has been a breach of the subsequently-executed settlement agreement and note.

In *McGee, supra,* no activity apart from or antecedent to the

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[10]It is not contended that the summons and complaint did not reach Dragor or, that Dragor did not have actual notice of the pendency of this suit.

[11]See *Pacheco v. Delgardo*, 46 Ariz. 401, 52, P.2d 479, 480; *Cano v. Arizona Frozen Products Co.*, 38 Ariz. 404, 300 Pac. 953; *Wilson v. Bogert*, 81 Ida. 535, 347 P.2d 341, 345.

contract was relied upon by the court in holding that the contract sued upon was sufficiently connected with the forum state to satisfy the due process requirements. It would not be correct, however, to say that such activity will never be relevant in establishing the necessary minimum contact. A contract upon which suit is brought may bring into issue prior dealings between the parties in the forum state, and these dealings may well provide a basis for jurisdiction. But where the agreement sued upon is in the nature of a settlement of existing claims, and the only issues presented relate to its breach and not its validity, we think the antecedent dealings are without constitutional significance and do not provide the necessary substantial connection.

Union further contends that under the settlement agreement the obligation upon which this suit was brought did not become effective until the two Arizona suits (Civ. 1482—Tuc .and Civ. 1478—Tuc.) were dismissed, and that, under the agreement, the dismissal of those suits was a condition to the delivery of the promissory note.

Nothing contained in the settlement agreement supports either of these assertions. Under that agreement Dragor was obliged to join in the dismissal of the Arizona suits. It did so. If it had not done so it would have been liable under the contract which was in effect when executed and delivered. The note was executed and delivered simultaneously with the settlement agreement in performance of one of the terms of the agreement. Had Dragor failed to execute and deliver the note it would have breached the settlement agreement.

The execution and delivery of the note took place in New York and so could not, in any event, have significance where the inquiry concerns activity in the forum state. The stipulations dismissing the Arizona suits were executed in New York but filed in Arizona. Such filing was long prior to September 30, 1964, when, Union asserts,

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[12]Nor does such act constitute the doing of business in Arizona. This is true because: (1) the only doing of business which is significant is that which is taking place when the cause of action arose or when the suit was begun, and here the filing was long prior thereto; and (2) participation in litigation in the courts of a state does not constitute the doing of business within that state. *Martin v. Bankers' Trust Co.*, 18 Ariz. 55, 156 Pac. 87, 90; *Compagnie DuPort De Rio De Janiero v. Mead Morrison Mfg. Co.*, D.C.D.M., 19 F.2d 163, 169; *Edward Sales Co. v. Harris Structural Steel Co.*, D.C.D.M., 17 F.2d 155, 157.

Dragor committed the breaches sued upon. The filing of these dismissals constitutes an isolated inconsequential act having no legal significance in this law suit. It does not provide a substantial connection of the kind referred to in *McGee*.[12]

Union argues that jurisdiction over Dragor was secured pursuant to Rule 4(d)(3) of the Federal Rules of Civil Procedure and Ariz. R.S. § 10-481. It is sufficient to say that the service of process thereby authorized must pertain to an action arising out of or involving business done or transactions arising in Arizona. Ariz. R.S. § 10-481(2); *Arizona Barite Co. v. Western-Knapp Engineering Co.*, 9 Cir., 170 F.2d 684-687. The claims here asserted by Union do not arise out of or involve business done or transactions arising in that state. They pertain only to the settlement agreement and note executed and delivered in New York.

Union points out that the certificate of the Arizona Commission provides that Dragor is no longer present in Arizona "except as to creditors," and argues that Union qualifies as a creditor. In our opinion, however, the quoted words are intended only to preserve such right as a creditor may assert under Arizona R.S. § 10-481(2). That, as we have seen, is the right to subject Dragor to personal jurisdiction in the courts of Arizona by service of pleadings or process upon the Commission, but only with regard to actions arising out of or involving business done or transactions arising in Arizona.

The result which we reach here places no hardship upon Union, but protects Dragor from the hardship of being hauled across the country to defend itself in a suit exclusively predicated upon claims arising in New York. Union is a New Jersey corporation and has its principal place of business in Illinois. Nothing in this record suggests how it will be prejudiced by suing Dragor in Delaware, where it was incorporated, or New York, where it has its principal place of business and where this cause of action arose. Arizona has no interest in providing Union with a forum for such an action.

Reversed.

APPENDIX B

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DRAGOR SHIPPING CORPORATION, a corp., formerly Ward Industries Corp.,
Appellant,

vs.

No. 20,416

UNION TANK CAR COMPANY, a corp.,
Appellee.

APPEAL from the United States District Court for the.....District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the.....District of Arizona, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the.....judgment of the said District Court in this Cause be, and hereby is reversed, with costs in this Court in favor of the appellant and against the appellee.

COSTS:

Supersedeas Bond	$5,713.00
DC Appeal Fee	5.00
Appeal Bond premium	10.00
Ninth Cir. Docket Fee	25.00
Reproduction costs:	56.11
Total	$5,809.11

Filed and entered April 7, 1966.

RECEIVED June 16, 1966.

APPENDIX C

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. Constitution of the United States.

Amendment V, providing in pertinent part:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, providing in pertinent part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Federal Rules of Civil Procedure, Rule 4(d), providing in pertinent part:

> "The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:
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> * * *
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> "(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.
>
> * * *
>
> "(7) Upon a defendant of any class referred

to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state."

3. Ariz. Rev. Stat. § 10-481, providing in pertinent part:

"Requirements for Doing Business; Exceptions. —*A.* A foreign corporation before entering upon, doing or transacting any business, conducting any enterprise, or engaging in any occupation in this state shall:

* * *

"2. File with the corporation commission a certificate, in the form prescribed by the commission, designating the address of the statutory office of the corporation in this state which may be, but need not be, the same as its place of business in this state, and appointing a statutory agent upon whom notices and processes, including service of sumons, may be served, which agent may be a natural person, a bona fide resident of this state for at least three years, or a domestic corporation or foreign corporation licensed to transact business in this state, empowered by the articles of incorporation to act as such agent, whose business address, if a corporation, shall be identical with such statutory office, and file with the corporation commission, in the form prescribed by the commission, an irrevocable consent to service of pleadings or process which shall become effective upon the revocation, annulment or voluntary withdrawal of the license of the corporation to do business in this state, and which shall provide that actions arising out of or involving business done or trans-

actions arising in this state may be commenced against the corporation in any court of competent jurisdiction within this state, by the service of pleadings or process upon the commission. The commission, upon being served, shall forward by registered mail a duplicate copy of the pleading or process, or both, to the last address of the corporation on file with the commission against which the pleading or process is directed."

Ariz. Rev. Stat. § 10-484, providing in pertinent part:

"C. Every foreign corporation licensed to do business in this state may surrender its license by filing with the corporation commission, in the form prescribed by it, a notice of withdrawal, or by filing a certified copy of a resolution of dissolution as prescribed by the laws of the state in which the corporation is domiciled, a notice from the state tax commission as provided in § 10-367, and by payment of any applicable fee authorized by statute."

Ariz. Rev. Stat. § 10-484.01, providing in pertinent part:

"Effect of Statutory Agents; Revocation of Existing Agents.—A. All appointments of statutory agents by a foreign corporation made prior to and which are in effect on June 30, 1958, shall continue in full force and effect until revoked as provided in subsection B.

"B. If the corporation has appointed more than one statutory agent in this state, it may file with the corporation commission a certificate, in the form prescribed by the commission, designating one of such statutory agents as its statutory agent pursuant to section 10-481 and revoking the appointment of all other statutory agents."